



No. 08-1285

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In The
Supreme Court of the United States

LAZAR S. FINKER, RAISSA M. FRENKEL,
STEVEN CHARLES KOEGLER, WILLIAM E. CHATTIN,
THEODOROS J. KAVALIEROS, and
AFRODITI KAVALIEROS,

Petitioners,

v.

GALINA WEBER,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

REPLY BRIEF

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REPLY BRIEF OF PETITIONERS

Respondent Galina Weber's ("Weber") Opposition to Petition for Writ of Certiorari raises new points warranting reply. Each new point raised by Weber is incorrect.

1. This Case Is Not Effectively Moot

Contrary to Weber's contention, this appeal is not moot. The discovery ordered in the Cyprus civil action does not cover or overlap the discovery ordered for use in the Swiss criminal case. Neither the time period nor claims in the Swiss criminal case overlap with those in the Cyprus civil case. The Eleventh Circuit correctly evaluated their relationship and found the discovery ordered was separate and not overlapping.

Although Weber simultaneously sought discovery for both her Cypriot and Swiss actions, the Magistrate Judge made careful rulings on the scope of discovery, separating out which discovery requests were appropriate for each action. The Magistrate Judge's careful analysis was adopted by the district court. The district court did not abuse its discretion.

Pet. App. 11, fn. 3.

Because Weber has not sought certiorari for review of the Eleventh Circuit opinion, this determination is not in dispute.

The discovery issues are ongoing in this case. Although the Magistrate Judge recently issued a Report and Recommendation concluding there should not be any more production ordered, the dispute is not concluded. The district court has granted additional time to file objections and appeal, and Weber's counsel has advised that she will appeal to that court. This Petition for Certiorari is not moot and the question presented is clearly defined and ripe for adjudication by this Court upon the law.

2. The Most Recent Amendment of 28 U.S.C. §1782(a) Merely Clarifies the Earlier Version of the Statute

Weber asserts that the Eleventh Circuit meticulously followed *Intel Corp. v. Advance Micro Devices, Inc.*, 542 U.S. 241 (2004), and that this Court did not determine the 1996 amendment to 28 U.S.C. §1782(a) was "a simple clarification." Opposition 18. Without explanation, Weber fails to acknowledge or explain this Court's determination:

In 1996, Congress amended §1782(a) to clarify that the statute covers "criminal investigations conducted before formal accusation."

Intel, 542 U.S. at 259.

Contrary to Weber's opposition, this Court in *Intel* concluded the 1996 enactment was a clarification of the 1964 revision that "judicial assistance would be available 'whether the foreign or international proceeding or investigation is of a criminal, civil,

administrative, or other nature. (Citation omitted.)’” *Id.* The Eleventh Circuit’s application of the “Last in Time” Rule to this case is incorrect because §1782’s last enactment is a clarification and does not preempt the U.S.-Switzerland MLAT (“Treaty”).

The Eleventh Circuit did not follow *Intel* with regard to the Treaty. If it had, its decision would necessarily be that the scope and extent of discovery should be determined according to the Federal Rules of Criminal Procedure. Contrary to the Eleventh Circuit decision and Weber’s Opposition, Petitioners invoked the Treaty because *Intel* directs district courts to consider several factors in ordering discovery, including whether or not the “§1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.” *Intel*, 542 U.S. at 265.

In considering whether to order discovery and the scope and extent of production for use in the Swiss criminal case, the district court should have considered the enacted policy of the Treaty and concluded that criminal rules control compelled evidence gathering in criminal proceedings. The Treaty reflects the policies of both countries. The district court did not evaluate this factor and the Eleventh Circuit failed to require the district court to consider this *Intel* factor in deciding whether to order pretrial production and, if so, the scope of discovery for the Swiss criminal case. *See, e.g., In re Application of Kulzer*, 2009 W.L. 961229 *3-5 (N.D. Ind., April 8, 2009) (rejecting argument that the *Intel* factors need

not be considered and then concluding petitioner was attempting a "blatant end-run around foreign proof-gathering restrictions or other policies of a foreign country").

In addition, contrary to Weber's opposition and the Eleventh Circuit opinion, *Intel* considered and decided the meaning of the statute's language that the discovery order "may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country of the international tribunal, for taking the testimony or statement or producing the document or thing . . . [or may be] the Federal Rules of Civil Procedure." This Court concluded the language is only a "mode of proof-taking instruction." *Intel*, 542 U.S. at 260, fn. 11. This limits the use of the Federal Rules of Civil Procedure to the procedures employed either for taking a deposition or requesting production, not for determining whether or not discovery is to be had or its scope. The Eleventh Circuit failed to follow this Court's directive in *Intel*.¹ In adopting this interpretation, *Intel* recognized this language was inserted into 28 U.S.C. §1782(a) as part of the 1964 enactment to alleviate problems encountered in the introduction of the evidence into foreign proceedings. Once again, the

¹ Petitioners' parenthetical following their citation of *Application of Sumar*, 123 F.R.D. 467 (S.D. N.Y. 1988), has an obvious error in the context of their brief and in the sentence itself. Pet. 15. It should read, in pertinent part, "(declining to apply the Federal Rules of *Criminal Procedure* . . .)".

Eleventh Circuit disregarded this Court's decision in *Intel* and decided the question in this appeal incorrectly.

◆

CONCLUSION

This case is a well situated, discrete case for the significant question raised in this Petition for Certiorari. The Eleventh Circuit's failure to follow *Intel* and the important jurisprudential issue warrants this Court exercising its supervisory power for an appropriate rule in 28 U.S.C. §1782(a) proceedings.

Respectfully submitted,

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